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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION

20 NATIONAL URBAN LEAGUE et al.,
21 Plaintiffs,
v.
22 WILBUR L. ROSS, JR., et al.,
23 Defendants.

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CASE NO. 5:20-cv-05799-LHK

PLAINTIFFS' SUBMISSION
REGARDING SCOPE OF
ADMINISTRATIVE RECORD

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 The administrative record (“AR”) includes “all documents and materials directly or
 2 *indirectly* considered by agency decision-makers and includes evidence contrary to the agency’s
 3 position.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Inst. For*
 4 *Fisheries Res. v. Burwell*, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017). It does not matter that
 5 this was informal agency action and so there is no preexisting record. *New York v. United States*
 6 *Dep’t of Commerce*, 351 F. Supp. 3d 502, 631 (S.D.N.Y. 2019). For the AR to be complete, it
 7 must include any documents and materials considered by agency decision-makers when making
 8 the decision to replace the COVID-19 Plan with the Replan.

9 Defendants’ objections to scope are purely practical in nature: they cannot do what the law
 10 requires in “two days.” That is a problem of their own making; this Court told them, on August
 11 26, that “[i]f there’s an administrative record, it should be produced.” Tr. 10:12-13. But given the
 12 upcoming September 17 PI hearing, Plaintiffs have no objection to a two-stage production that
 13 will, ultimately, result in a complete AR. The portion of the AR most important to the current PI
 14 motion, and which should be producible and produced in two days, should include:

- 15 • Subject matter: All documents (1) comprising the Replan and its various components for
 16 conducting the Census in a shortened time period, including guidance, directives, and
 17 communications regarding same; and (2) all documents and materials directly or indirectly
 18 considered when making the decision to replace the COVID-19 Plan with the Replan.
- 19 • Date Range: Apr. 13–Aug. 3, 2020. The AR cannot be artificially constrained in time. If
 20 the Replan was “informed” by the Bureau’s “prior planning,” then such documents must
 21 be included. But for purposes of the most immediate production, Defendants can limit
 22 their review to documents and materials directly or indirectly considered during these four
 23 months, as it seems most likely that any decision to replace the COVID-19 Plan (adopted
 24 April 13) with the Replan (adopted August 3) occurred during this time.
- 25 • Custodians: The first tranche of custodians can appropriately be limited to (1) Defendants
 26 Dillingham and Ross and all of their direct reports/subordinates, and (2) Deputy Director
 27 Fontenot, his subordinates, and the individuals engaged with Mr. Fontenot to consider and
 28 prepare the Replan.

29 This would not be “years” of data. Nor does it cover hundreds of employees. But it will
 30 allow the Court to see what the Replan was conceived to be and is; when the decision was made;
 31 and what was considered when making the decision to shorten the data collection and processing
 32 timeframes. Plaintiffs are prepared to file their reply brief within 48 hours of receiving this subset
 33 of the AR, or at any other time preferred by the Court, and respectfully submit that the complete
 34 AR should be compiled and lodged with the Court by September 16, 2020.

1 Dated: September 9, 2020

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12 **ATTESTATION**

13 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
14 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
15 in this filing.

16 Dated: September 9, 2020

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